ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Petition of U S WEST, Inc. for Declaratory Ruling Preempting State Commission Proceedings To Regulate Provision of Federally Tariffed Interstate Service	CC Docket No. 00-51

REPLY COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") respectfully submits this reply to the comments filed on its Petition for Declaratory Ruling.

INTRODUCTION AND SUMMARY

U S WEST filed its petition because AT&T has initiated proceedings in five different states asking the *state* commissions to prescribe provisioning intervals and service standards for U S WEST's *federally* tariffed access services, even though it is undisputed that AT&T predominantly uses these services for interstate traffic. In its petition, U S WEST demonstrated three things: *first*, sections 2(a) and 201-208 of the Communications Act occupy the field and give the Commission exclusive jurisdiction to regulate the terms of federally tariffed interstate services (including, by clear Commission precedent, mixed-use access services carrying more than ten percent interstate traffic); *second*, the filed rate doctrine (codified in section 203(c) of the Act) bars AT&T from bringing collateral state proceedings to obtain terms and conditions of service that differ

from those contained in U S WEST's federal tariffs; and *third*, it is impossible to regulate the interstate and intrastate uses of these access facilities separately, justifying federal preemption under well established judicial precedent.

The response to U S WEST's petition is remarkably thin. AT&T — perhaps recognizing that its present opposition to the Commission's jurisdiction cannot be reconciled with its prior advocacy in state access proceedings — halfheartedly suggests that the issues cannot be resolved by a declaratory ruling because they are contested. It also cites a smattering of inapposite savings provisions from the Act that do not themselves create the missing state authority to regulate interstate services. The Minnesota Department of Commerce ("DoC") cites the same provisions for the unremarkable proposition that the Act recognizes roles for both state and federal regulators. But the DoC fails to explain what in the Act could possibly give *states* the authority to regulate predominantly *interstate* services like the ones at issue here. This is a particularly puzzling omission, given the DoC's concession that the subsidiary intrastate aspects of these services cannot be severed from the dominant interstate components. Finally, rather than take any position on the merits, the Minnesota Public Utilities Commission ("PUC") simply states that it is aware of the jurisdictional question and plans to address it. The controversy, however, extends far beyond Minnesota: that state is only one of five in which U S WEST must defend against these unlawful complaints, and two other states (Colorado and Washington) have already ruled that the Commission's jurisdiction over these interstate services is not exclusive.

U S WEST first addresses the three commenters' procedural objections to the requested relief, then addresses their substantive objections.

ARGUMENT

I. U S WEST'S REQUEST FOR PREEMPTION IS PROCEDURALLY APPROPRIATE.

AT&T and the Minnesota PUC raise two threshold procedural arguments, neither of which has merit. First, in a throwaway footnote, AT&T suggests that the Commission cannot resolve this case through a declaratory ruling because the parties are disputing the facts and applicable law. *See* AT&T Comments at 1 n.2. This is a red herring. Unanimity among the parties has never been a prerequisite for obtaining a declaratory ruling; after all, the whole point of such a ruling is to "terminat[e] a controversy or remov[e] uncertainty." 47 C.F.R. § 1.2. But everybody here agrees on the relevant facts: The access facilities and services about which AT&T is complaining overwhelmingly (if not exclusively) carry interstate traffic;[1] AT&T is purchasing these services out of U S WEST's *federal* tariff; and AT&T is asking state commissions to adopt provisioning intervals and quality-of-service directives for these services, even though these subjects are covered by U S WEST's FCC tariff. The only thing in dispute here is the applicability of Commission precedents and the 1996 Act. This petition is thus very different from AT&T's 1999 request for a declaratory ruling regarding CLEC access charges, which the Commission properly denied. There, AT&T sought a declaration that

[1] In this regard, U S WEST wishes to correct one significant typographical error in its Petition. The last paragraph on page 3 states that in Washington State, "2 out of the 70 held orders at issue were for interstate services provided to AT&T under U S WEST's federal tariff." The sentence should have read that "*all but two* of the 70 held orders at issue were for interstate services." In other words, 68 of the 70 orders at issue in AT&T's state complaint were for interstate services subject to this Commission's exclusive jurisdiction. This fact was clear from the record in the Washington proceedings. *See* U S WEST's Motion to Dismiss, No. UT-991292, at 2 (filed Sept. 16, 1999).

certain CLEC charges and practices were unreasonable, but failed to describe the charges and practices accurately; since the Commission could not be sure what the actual facts were, it could not issue a declaratory ruling on that record.[2]

The Minnesota PUC, on the other hand, asks the Commission not to issue a declaratory ruling because the PUC "is aware of the federal preemption issue and is simply developing the record it needs to resolve that issue"; the PUC assures the Commission that it "is carefully considering the limits of its authority over access services in relation to the FCC's authority." Minnesota PUC Comments at 2. U S WEST does not doubt the Minnesota PUC's sincerity. But the fact that one state commission is aware that it may lack jurisdiction over these predominantly interstate access services does not obviate the need for a declaratory ruling; Minnesota is only one of five states in which AT&T has filed its improper complaints, and the same legal issue has also arisen in other states in various contexts (including cases in which AT&T has argued precisely the opposite of what it is suggesting now). Moreover, two states, Washington and Colorado, have already refused to defer to the Commission's exclusive jurisdiction over these access services — in Washington's case, specifically because the Commission has not yet issued a clear ruling preempting state jurisdiction.[3] Given that the scope of the Commission's jurisdiction over these interstate services does not change from state to state, U S WEST should not be put to the expense and effort of litigating these same

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[2] *See* Fifth R&O and FNPRM, *Access Charge Reform*, 14 FCC Rcd 14221, 14316-20 ¶¶ 186-90 (1999).

[3] *See* Third Supplemental Order of the WUTC, Docket No. UT-991292, at 4 (Nov. 12, 1999) (exercising jurisdiction because "[t]he FCC has not in any way clearly provided that it preempts state regulatory agencies"). The WUTC Order was filed as an attachment to U S WEST's Petition for Declaratory Ruling.

issues in each of its states and left to hope (against experience in Colorado and Washington) that each one will reach the correct result.

II. U S WEST'S REQUEST FOR PREEMPTION IS APPROPRIATE AS A MATTER OF LAW.

A. The Various Savings Clauses in the 1996 Act Merely Preserve Existing State Authority Over Purely Intrastate Services; They Do Not Create State Authority over Predominantly Interstate Services.

As U S WEST demonstrated in its petition, section 2(a) of the Communications Act gives the Commission sole and exclusive jurisdiction over "*all* interstate and foreign communication by wire or radio," 47 U.S.C. § 152(a) (emphasis added), and sections 201 through 208 of the Act prescribe the exclusive regime for tariffing interstate common carrier services and enforcing or modifying the service terms and conditions contained in those tariffs. *See* 47 U.S.C. §§ 201-208. AT&T and the Minnesota DoC can cite no provision of the Act giving state commissions any affirmative authority to regulate these interstate services. Instead, they proffer an assortment of savings clauses that are entirely inapposite. There is simply no *state* authority to "save" here, because the states have never had any jurisdiction over *federally* tariffed services in the first place.

Both commenters cite 47 U.S.C. § 261(c), which provides that "[n]othing *in this part*" — *i.e.*, nothing in Part II of Title II, 47 U.S.C. §§ 251-61 — "precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." 47 U.S.C. § 261(c) (emphasis added). *See* AT&T Comments at 4; Minnesota DoC Comments at 4. But section 261(c)

is, by its very terms, merely a rule of construction only for sections 251 through 261 of the Act, and those sections are not the basis of either AT&T's complaints or U S WEST's petition. The Commission's exclusive jurisdiction over federally tariffed interstate access services (and the exclusivity of the statutory procedures for enforcing or modifying these federal tariffs) comes from sections 2(a) and 201 through 208 of the Communications Act (*i.e.*, Part I of Title II), which section 261(c) simply does not touch.[4] The same is true for 47 U.S.C. § 261(b), cited by the Minnesota DoC.[5] *See* Minnesota DoC Comments at 4.

Next, AT&T wrenches from context an excerpt of section 253(b) of the Act for the proposition that states are given the authority to impose any requirements needed to ensure the continued quality of telecommunications service. *See* AT&T Comments at 4. Section 253(b) says no such thing. This provision, too, is a rule of construction, not an affirmative grant of authority to regulate federally tariffed interstate services. Section 253 in general is a *restriction* on state authority, voiding all state requirements that act as barriers to entering the local services market and authorizing the FCC to preempt enforcement of such state requirements. *See* 47 U.S.C. §§ 253(a), (d). Section 253(b) simply limits this specific federal authority by providing that "[n]othing *in this section* shall affect the ability of a state to impose, on a competitively neutral basis and consistent

[4] The reason Congress limited section 261(c)'s application to sections 251 through 261 is that Part II of Title II gave the Commission new authority over *local* services that had previously been the exclusive province of the states. Part I, by contrast, deals with core interstate services over which the states have *never* had jurisdiction; the Part II savings clause was not applied to Part I because there was simply no state authority to save with regard to these federally tariffed interstate services.

[5] Section 261(b) likewise provides, "Nothing *in this part* shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. §261(b) (emphasis added).

with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b).[6] Again, U S WEST's request for preemption is not based on section 253.

Finally, the Minnesota DoC cites section 2(b) of the Act, which provides that Title II does not give the Commission jurisdiction over purely *intrastate* services or practices. *See* 47 U.S.C. § 152(b); Minnesota DoC Comments at 4. But U S WEST does not ask the Commission to assert jurisdiction over purely intrastate services that have no interstate connection. Rather, U S WEST is asking the Commission to confirm that its rules apply to the incidental, impossible-to-sever intrastate component of federally tariffed access facilities that overwhelmingly carry interstate traffic. *See Louisiana Public Svc. Comm'n v. FCC*, 476 U.S. 355, 376 (1986). Even the Minnesota DoC concedes that this interstate and intrastate components of these services are inextricably "intertwin[ed]" and that quality-of-service standards governing the provisioning of one component necessarily affect the provisioning of the other. *See* Minnesota DoC Comments at 12.

B. As AT&T Has Acknowledged Before, the Fact that These Complaints Involve Mixed-Use Access Facilities Does Not Create State Jurisdiction.

AT&T and the Minnesota DoC make much of the fact that the access services in question may be used for some small amount of intrastate traffic in addition to interstate

[6] Section 253 is thus "a very, very broad prohibition against State and local activities," "follow[ed by] two subsections that attempt to carve out reasonable exemptions" to that general prohibition. 141 Cong. Rec. S8212 (daily ed. June 13, 1995) (statement of Sen. Gorton).

traffic; citing no legal authority, they assert that this gives both state and federal regulators concurrent and plenary jurisdiction to regulate these services in their entirety. *See* AT&T Comments at 3; Minnesota DoC Comments at 5-6. But these commenters are forgetting that the Commission *has* a rule governing mixed-use access facilities like the ones here. For more than a decade, the Commission has recognized that access facilities are commonly used for both interstate and intrastate traffic, and that it is impossible to tease these components apart and regulate them separately. Rather than subject these mixed-use access facilities to concurrent (and potentially conflicting) state and federal regulation, as the commenters would do, the Commission has asserted *exclusive* jurisdiction over any access facility carrying more than a *de minimis* amount — ten percent — of interstate traffic. *See* Mem. Op. & Order, *GTE Tel. Operating Cos.*, 13 FCC Rcd 22466, 22479 ¶ 23 (1998); Decision & Order, *MTS/WATS Market Structure*, 4 FCC Rcd 5660 ¶ 2 (1989). Such mixed-use services are tariffed *only* at the Commission, and subject *only* to federal regulation. *See GTE Tel. Operating Cos.* at 22480, 22481 ¶¶ 25, 27.[7]

The commenters make no attempt to explain why this longstanding ten percent rule for mixed-use access facilities should not govern. Indeed, the Minnesota DoC expressly concedes that the regulation codifying the rule *does* apply, and that the facts of

[7] The existence of a clear federal rule asserting exclusive tariffing and regulatory authority over mixed-use access facilities makes the DoC's citation of the Commission's reciprocal compensation order inapposite. *See* Minnesota DoC Comments at 5 (citing Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999), *vacated sub nom. Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000)). In that order, the Commission allowed state arbitrations of intercarrier compensation agreements to stand as an interim matter *only until* the Commission could prescribe a uniform federal rule appropriate to its jurisdiction.

this case are in all relevant aspects *identical* to those on which the rule is based: "The Department agrees that the use of the access services at issue is thoroughly mixed between interstate and intrastate traffic, so much so that a codified process is necessary to establish cost allocating and ordering out of the tariff. 47 C.F.R. § 36.154." Minnesota DoC Comments at 12. But then the DoC inexplicably suggests that the ten percent rule is in fact an "acknowledgement that both state and federal regulatory bodies will have appropriate interests in the provision of the mixed use facilities . . . and that these concurrent interests must be accommodated." *Id.* at 7. This makes no sense. A rule that whisks tariffing jurisdiction away from the states (and thus, given the filed rate doctrine, the authority to regulate the subject matter of those tariffs) as soon as there is a *de minimis* amount of interstate traffic is hardly an endorsement of concurrent state regulatory authority. On the contrary, the rule reflects an understanding that state regulation of mixed-use access facilities so threatens the federal interest in regulating interstate services that the entire matter must be handed over to the Commission as soon as there is any appreciable amount of interstate traffic.

AT&T simply notes the Commission's longstanding precedent, then suggests it can be ignored because there may (or may not — AT&T offers no proof) be significant intrastate traffic on access lines covered by the rule. AT&T Comments at 3. AT&T's cavalier, one-sentence dismissal of the ten percent rule stands in sharp contrast to what AT&T has previously argued in the states when seeking to avoid complaints arising from AT&T's practices in connection with its own interstate access facilities. AT&T was far more forthright to the Illinois Commerce Commission in successfully moving to dismiss

an Ameritech complaint on the ground that the FCC has exclusive jurisdiction over mixed-use access facilities:

> In [the *MTS/WATS Market Structure Order*,] the FCC made it clear that the Federal Communications Act gives it plenary jurisdiction over interstate telecommunications services. . . . [T]he FCC also adopted what is commonly referred to as the 10% jurisdictional rule, which was intended to address the jurisdictional nature of mixed use facilities, i.e. facilities that carry both interstate and intrastate traffic. That jurisdictional rule provides that if the interstate traffic on a particular facility constitutes more than 10% of the total traffic, the facility is assigned *in its entirety* to the interstate jurisdiction. . . . *The practical effect of this assignment is that the services are then governed by interstate tariffs and the FCC, consequently, has jurisdiction over the tariff and corresponding terms of the interstate service.*

AT&T's Renewed Motion to Dismiss, Illinois Bell Tel. Co. v. AT&T Corp., No. 97-0624 at 4-5 (Ill. Commerce Comm'n, Jan. 14, 1998) (first emphasis in original).[8] Although AT&T now claims to see no possible conflict between state and federal regulation of mixed-use access services, *see* AT&T Comments at 4, it told the ICC just the opposite:

> [The ten percent rule] assures that the FCC and state commissions do not assert concurrent jurisdiction over identical services and, consequently, eliminates the possibility of contrary findings relating to the terms and conditions of those services. Ameritech's position — that state commissions can make findings relating to the terms and conditions of interstate telecommunications services — would effectively eliminate one of the key benefits of the jurisdictional rule by allowing state commissions and the FCC to make concurrent, and potentially contradictory, findings regarding AT&T's provisioning of these access circuits.

AT&T's Renewed Motion to Dismiss at 7-8. AT&T makes no effort to explain its about-face in this proceeding, nor could it.

[8] For the Commission's convenience, a copy of AT&T's pleading is attached as Appendix A.

C. The Filed Rate Doctrine (and Section 203(c)) Bars All Collateral Attempts To Modify or Add to the Service Standards in U S WEST's Federal Tariffs.

In its petition, U S WEST demonstrated that its federal access tariff covers all of the provisioning and quality of service issues raised in AT&T's complaints, that this tariff (and the federal tariff enforcement process) provides the exclusive remedies for a failure to meet the tariff's provisioning and quality-of-service standards, and that the filed rate doctrine bars AT&T from seeking additional service guarantees or enforcement penalties through collateral proceedings in court or before state agencies. Moreover, section 203(c) of the Act bars U S WEST from charging any prices, offering any service guarantees, or undertaking any practices other than those contained in its FCC tariff, even if the extra-tariff practices would *benefit* the customer. The Minnesota DoC raises a number of objections to this argument, all of which misapprehend the scope and operation of the filed rate doctrine and section 203(c).

First, the Minnesota DoC suggests that, because one of the cases U S WEST cites (*AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998)) dealt with extra-tariff state law contract and tort claims, those are the only types of claims precluded by the filed rate doctrine; according to the DoC, the filed rate doctrine does not reach state regulatory proceedings. *See* Minnesota DoC Comments at 8-9. This misstates the law. The filed rate doctrine bars *any* collateral proceeding — judicial or regulatory — designed to obtain prices, terms, or conditions of service beyond those specified in a carrier's tariff, because the sought-after relief would put the carrier in violation of section 203(c). Many cases make clear that the filed rate doctrine applies in state regulatory proceedings just as in judicial proceedings, and if a federal regulator approves a filed rate

or tariffed terms of service, a state commission may not, in the name of enforcing state regulation, require the provider to charge different rates or terms. *See, e.g.*, *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 372 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986).

The Minnesota DoC also argues that the filed rate doctrine should not apply because AT&T's complaints are based on U S WEST's "state tariff and state quality of service standards" rather than some private "extra-tariff intercompany agreement." Minnesota DoC Comments at 9. It fails to explain why this should make a difference. As AT&T admitted to the Illinois Commerce Commission, the terms of a federal tariff comprehensively govern *all* aspects of a mixed-use access facility carrying more than ten percent interstate traffic:

> Under the FCC's jurisdictional separations rule, if the dedicated circuits at issue carry more than 10% interstate traffic, then the charges for those circuits are accessed out of an interstate tariff . . . which *comprehensively* covers the terms and provisions for the interstate access service and which is governed by the FCC. *Consequently, the terms of that interstate tariff apply to all the traffic running on those circuits, whether interstate or intrastate.*

AT&T's Renewed Motion to Dismiss at 6-7 (emphases added). State tariffs and state quality of service standards are no less external to the governing federal tariff than a private intercompany agreement. Section 203(c) forbids U S WEST from deviating in any way from its federal tariffs (and forbids collateral proceedings to obtain such deviations) regardless of where the noncomplying terms and conditions come from.

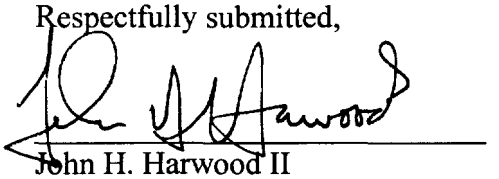
Finally, the Minnesota DoC suggests that, since the filed rate doctrine is designed to prevent carriers from discriminating in providing service, the doctrine is inapplicable when a state seeks to enforce additional protections for customers. *See* Minnesota DoC

Comments at 10-11. Again, this misses the point. The filed rate doctrine avoids discrimination by barring carriers from deviating from their tariffs, even to *benefit* a particular customer or group of customers. *See Central Office Telephone*, 524 U.S. at 223 ("Regardless of the carrier's motive — whether it seeks to benefit or harm a particular customer — the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services."); 47 U.S.C. § 203(c) (barring carriers from "extend[ing] to any person any privileges . . . except as specified in" the federal tariff). AT&T may not use collateral state proceedings to seek special rights beyond the tariff to enforce provisioning intervals for interstate services. As the Supreme Court has made clear, "[f]aster, guaranteed provisioning of orders for the same rate is certainly a privilege within the meaning of § 203(c) and the filed-rate doctrine." *Central Office Telephone*, 524 U.S. at 225. Nor may a state commission direct U S WEST to give AT&T (or even all customers in that particular state) guarantees about the quality of U S WEST's interstate service that are not available to any other customer purchasing those services from U S WEST's federal tariff.

CONCLUSION

For the reasons stated above and in U S WEST's petition, U S WEST respectfully requests that the Commission issue a declaratory ruling preempting AT&T's improper attempts to have state commissions prescribe provisioning intervals and service standards for U S WEST's federally tariffed access services.

Respectfully submitted,



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May 9, 2000

APPENDIX A

STATE OF ILLINOIS

BEFORE THE ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, *Complainant,*	)	
vs.	)	Docket No. 97-0624
AT&T CORP. and AT&T COMMUNICATIONS OF ILLINOIS, INC., *Defendants.*	)	

AT&T'S RENEWED MOTION TO DISMISS

Defendants, AT&T Communications of Illinois, Inc. and AT&T Corp. (collectively "AT&T"), hereby renew the Motion to Dismiss Ameritech's Complaint filed December 8, 1997. AT&T is renewing its Motion to Dismiss because Ameritech has not, and cannot, rebut the fact that the number of intrastate circuits affected by AT&T's Shared Customer Provided Access ("SCPA") policy is *de minimus* (approximately ¼ of 1% of the total number of circuits affected by that policy). Thus, it is now undisputed that the Commission lacks subject matter jurisdiction over the circuits about which Ameritech complains.

I. THE INTERSTATE NATURE OF THE CIRCUITS AT ISSUE IS NOW UNDISPUTED

In its original Motion to Dismiss filed December 8, 1997, AT&T explained the history behind its SCPA policy, which was intended to level the playing field by removing preferential treatment and placing all customer provided access providers on an

equal footing. In that Motion, AT&T also requested that the Commission dismiss the entire Complaint based on certain jurisdictional grounds.[1]

One of the grounds[2] raised by AT&T was that even if the SCPA arrangement could be considered a "telecommunications service," as that term is defined in the Illinois Public Utilities Act ("PUA"), the Complaint ultimately concerns Baseline and Coordinated access circuits that are almost entirely interstate in nature. Thus, the circuits at issue fall within the interstate, not intrastate jurisdiction. In illustrating this fact, AT&T noted that of the total Baseline and Coordinated circuits subject to the SCPA policy in Illinois, only 6 (approximately ¼ of 1%) are classified as intrastate.

At the hearing on AT&T's Motion to Dismiss, the Hearing Examiner made it abundantly clear that he expected Ameritech to respond to AT&T's assertions regarding the nature of the circuits at issue in this matter because, as the Hearing Examiner commented, if those assertions were true it would be "egregious" for Ameritech to have brought this Complaint based on such *de minimus* intrastate concerns:

> I would also like the parties to check the assertion made by [AT&T] in the motion to dismiss that out of the 2400 base line circuits involved as part of the complaint, there are none that are intrastate in nature, and out of the 500 coordinated access circuits, there are only 6 that are intrastate in nature.

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[1] In addition to the jurisdictional grounds for dismissal of the entire Complaint, AT&T also requested dismissal of Counts II and IV based on the fact that the statutory basis of those counts only extended to "competitive" telecommunications. In fact, in the December 15, 1997 hearing in this matter, the Hearing Examiner agreed and dismissed Count II for that very reason (12/15/97 Tr. 12), while leaving open the question of whether Count IV should be dismissed on that same basis as a question of fact.

[2] In its original Motion to Dismiss, AT&T also argued that the Commission lacks jurisdiction in this matter since the SCPA arrangement is not a "telecommunications service," as defined in the Illinois Public Utilities Act. At the December 15th Hearing, the Hearing Examiner found that the question of whether or not the SCPA arrangement is a "telecommunications service" is a question of fact that the Commission will address after hearing. (12/15/97 Tr. 12-13.)

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> If there are almost 3,000 circuits and only 6 are intrastate in nature . . . it would be just about as egregious [as a particular issue in the MCI/Ameritech Illinois complaint, ICC Docket No. 97-0540].

(12/15/97 Tr. 14-16.)

Despite the Hearing Examiner's directive, Ameritech has never responded to the Hearing Examiner's request. In fact, Ameritech's Direct Testimony fails to address the issue of the jurisdictional nature of the circuits. In an effort to force a response from Ameritech, AT&T served discovery on Ameritech asking it to identify the number of Ameritech's Baseline or Coordinated circuits that carry intrastate traffic. In other words, AT&T asked Ameritech to identify any circuits that are intrastate. In response, Ameritech could not identify one such circuit and stated that it could not answer these requests since its databases do not "readily" distinguish between circuits that carry interstate or intrastate traffic. (Ameritech's Response to the relevant data requests is attached as Attachment A.)

Therefore, it is now clear that Ameritech does not, indeed cannot, dispute AT&T's verified assertion regarding the number of intrastate circuits involved in this matter. That fact is undisputed.

II. THE INTERSTATE NATURE OF THE ACCESS CIRCUITS NECESSITATES DISMISSAL OF THE COMPLAINT

Since the facts supporting AT&T's original Motion to Dismiss are now undeniably undisputed, AT&T is renewing its Motion to Dismiss Ameritech's entire Complaint based on jurisdictional grounds. Attached to this Motion as

Attachment B is the affidavit of Robert Polete, which details the undisputed facts upon which this renewed motion is based.

As that affidavit makes clear, for all the circuits in question that are the subject of Ameritech Complaint – that is, for all Baseline and Coordinated access circuits in Illinois – AT&T consulted its circuit inventory records to determine their jurisdictional assignment. (Affidavit ¶ 4.) The jurisdictional assignment of those circuits is based on the access customer's declaration of preferred access arrangement or PAA, as well as the customer's declaration of the amount of interstate and intrastate use of the service, all in accordance with the FCC's regulations. (Affidavit ¶ 4.) Of the total Baseline and Coordinated circuits in Illinois, only six Coordinated circuits (about ⅛ of 1%) are intrastate. (Affidavit ¶ 5.)

As AT&T noted in its original Motion to Dismiss, the assignment of access circuits as interstate or intrastate is based on the FCC's 1989 Jurisdictional Order. In that order, the FCC made it clear that the Federal Communications Act gives it plenary jurisdiction over interstate telecommunications services. (See citations to 1989 Jurisdictional Order in AT&T's December 8, 1997 Motion to Dismiss, pp. 7-8.) On the recommendation of the Federal-State Joint Board, the FCC also adopted what is commonly referred to as the 10% jurisdictional rule, which was intended to address the jurisdictional nature of mixed use facilities, i.e. facilities that carry both interstate and intrastate traffic. That jurisdictional rule provides that if the interstate traffic on a particular facility constitutes more than 10% of the total

traffic, the facility is assigned in its entirety to the interstate jurisdiction. Id. The practical effect of this assignment is that the services are then governed by interstate tariffs and the FCC, consequently, has jurisdiction over the tariff and corresponding terms of the interstate service.

The now undisputed facts make certain that to the extent there is any jurisdictional basis for action by this Commission (which AT&T does not concede), such basis is at most *de minimus*. Any action by the Commission here, it goes without saying, could not properly attach to interstate facilities. In effect, therefore, even if this Commission were to assert its jurisdiction to the full extent permissible, and if after hearings it were to find that Ameritech's complaint has merit and grant the relief Ameritech seeks, the universe of facilities affected would be inconsequential at best. The Hearing Examiner is right, Ameritech's Complaint is "egregious" and should be dismissed.

Unable to dispute the fact that less than 1% of all Baseline and Coordinated circuits at issue are intrastate, Ameritech attempts to confuse the issue by claiming that the classification of the circuits as interstate is "irrelevant" to whether or not this Commission has jurisdiction over those circuits. (Ameritech Response to Motion to Dismiss, p. 9.) Instead, Ameritech claims that the SCPA arrangement involves "telecommunications services" over which the Commission has jurisdiction by virtue of the PUA. Id. Staff, in its testimony filed January 13, 1998, has taken a similar position.

However, this argument proves too much. The issue of whether a service is or is not a "telecommunications service" is not determinative of the issue of whether or not that service falls under this Commission's jurisdiction. The reference in Section 13-203

of the PUA to "access and interconnection" arrangements and services cannot extend the ICC's jurisdiction beyond the intrastate arena to access and interconnection arrangements for interstate services, but that is exactly what the reading advanced by Ameritech would do.

Put another way, the Commission does not have jurisdiction over interstate "telecommunications services." Section 13-203 no more extends the Commission's jurisdiction to interstate access, for example, than does the reference in that section to "transmittal of information" give the Commission jurisdiction over interstate "transmittal of information." To the contrary, the Commission only has jurisdiction over telecommunications services that would otherwise be within its (intrastate) jurisdiction.

If it were in fact true that the Commission were deemed to have jurisdiction over all access and interconnection arrangements without regard to the nature of the underlying arrangements (i.e. access and interconnection for what services and the jurisdictional character of those services), then the Commission's jurisdiction would be virtually boundless. The argument, in other words, proves too much and is therefore untenable.

The FCC's jurisdictional separations rule is not only relevant to the issue of whether or not this Commission has jurisdiction over the access circuits at issue, it is determinative of that issue. The circuits at issue are dedicated access circuits connecting to AT&T's interexchange service. (Affidavit ¶ 3.) Under the FCC's jurisdictional separations rule, if the dedicated circuits at issue carry more than 10% interstate traffic, then the charges for those circuits are accessed out of an interstate tariff (AT&T's federal Private Line Tariff, FCC No. 9), which comprehensively covers the terms and provisions

for the interstate access service and which is governed by the FCC. Consequently, the terms of that interstate tariff apply to all the traffic running on those circuits, whether interstate or intrastate. Thus, if the SCPA activities at issue here constitute "telecommunications services," as Ameritech contends, then the FCC's jurisdictional rule logically demands that they be deemed interstate telecommunications services that fall within the same federal jurisdiction as the other tariffed functions relating to interstate access. While the terms and conditions relating to the circuits at issue are governed comprehensively by the FCC and interstate tariffs, Ameritech is illogically arguing that the provisioning of space and power for those circuits can be governed by state commissions.

The need to preserve coherent and consistent jurisdictional lines is illustrated in the testimony of Staff field January 13, 1998. Staff proposes that Ameritech should compensate AT&T going forward for all space and power arrangements for dedicated access, including "Total Service" access, and that Ameritech modify its tariff (ICC No. 21) accordingly. That is Ameritech's state tariff, however; the ICC of course cannot effect a modification of Ameritech's interstate tariff, which for the reasons pointed out elsewhere govern all but very few of the circuits in question. (Affidavit, ¶¶ 4, 5.)

Ameritech's argument also runs contrary to one of the underlying purposes of the FCC's jurisdictional rule. That rule, which was the product of a compromise between state and federal regulators, assures that the FCC and state commissions do not assert concurrent jurisdiction over identical services and, consequently, eliminates the possibility of contrary findings relating to the terms and conditions of those services. Ameritech's position – that state commissions can make findings relating to the terms and

conditions of interstate telecommunications services – would effectively eliminate one of the key benefits of the jurisdictional rule by allowing state commissions and the FCC to make concurrent, and potentially contradictory, findings regarding AT&T's provisioning of these access circuits. In fact, that very threat presents itself here since the FCC currently has pending before it a proceeding in which AT&T's SCPA policy is at issue. In short, the Commission should reject Ameritech's attempt to undermine the carefully crafted and well-settled jurisdictional rule set forth in the FCC's Jurisdictional Order.

CONCLUSION

WHEREFORE, for the reasons set forth herein and in AT&T's original Motion to Dismiss, AT&T requests that the Commission dismiss the Complaint, with prejudice, for lack of subject matter jurisdiction.

Respectfully submitted,

AT&T CORP.

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Dated: January 14, 1998

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May, 2000, I caused a true copy of the foregoing Reply Comments of U S West, Inc. to be served by hand delivery or overnight courier service upon the following parties:

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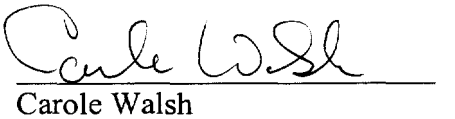

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